BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Puerto Rico [R. 18-34] is not officially reported. The opinions of the several Judges of the Circuit Court of Appeals [JUDGE MAHONEY, R. 47-59; JUDGE MAGRUDER, R. 59-62; JUDGE PETERS, R. 62] are reported in 114 F. (2d) 969, 976, 977 (*Advance Sheets*).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

The judgment of the Circuit Court of Appeals was entered October 16, 1940 [R. 47, 62].

QUESTIONS PRESENTED

The questions presented are stated in the Petition (*ante*, pp. 6-8, 10-13).

STATUTES INVOLVED

These are indicated in the Petition (*ante*, p. 10), and pertinent parts including those of the Swedish Trade Agreement, are set out in the Appendix (*infra*, pp. 41-55).

LEGISLATIVE BACKGROUND AND POLICY

The established policy of the Legislature of Puerto Rico to encourage local industries in the Island, and particularly local manufacturing industries, has been manifested by a series of acts.

FIRST. Acts authorizing exemption of new industries from local taxation for a period of years: Act No. 92 of 1917 ("Promulgated, March 31, 1919, in virtue of a

decision of the Supreme Court of Porto Rico of March 11, 1919"); with its successor Acts: Act No. 16 of May 20, 1925, Laws of Puerto Rico, 1925, pp. 132-134; Act No. 10 of May 12, 1927, Laws of Puerto Rico, 1927, Second Special Session, pp. 430-432; Act No. 40 of April 25, 1930, Laws of Puerto Rico, 1930, pp. 314-316; and Act No. 94 of May 14, 1936, Laws of Puerto Rico, 1936, pp. 494-496. [Pertinent parts in the Appendix, *infra*, pp. 47-54.]

SECOND. "Exposition of Motives", in Act No. 138 of May 15, 1937 [Laws of Regular Session, 1937, pp. 296-301], "To promote the industry of tourism in Puerto Rico", that [*ibid*, at p. 297]:

> "It is undeniable that aside from the direct benefits that the immediate expenditures made by the tourists who visit the Island, there may be among the persons who visit us and have the opportunity to learn about our economic problems, *some whose interest in establishing new industries in the Island may be aroused*, and this would necessarily affect the general welfare of the country and favor especially the needy classes who are demanding more opportunities to earn their living" (*Italics supplied*).

THIRD. All of the foregoing statutes, and many others, indicate that the purpose of fostering new industries in the Island is among the purposes that are constantly foremost in the thought of the insular Legislature.

FOURTH. The court will take judicial notice, moreover, of the well known conditions in the Island indicating the outstanding need to foster new industries, particularly new manufacturing industries. The Island has a total area of around 2,198,000 acres, including everything, mountain tops and all; an area of cultivable land not exceeding 1,500,000 acres; a population by the 1935 census conducted by the Puerto Rico Reconstruction Administration of 1,723,534 people; and a present [preliminary

1940 census] population of 1,869,245 people.[3] That is to say considerably more than one person for every acre of cultivable land. The Island is predominantly agricultural; more than two-thirds of the population, estimated, is classed as "rural population".[4] Total shipments from the Island for the fiscal year ending June 30, 1936, were $99,133,924, out of which some 90 per cent, were of agricultural products, including sugar.[5] The second largest item of shipments, needlework, $14,275,785, is almost entirely handwork, by women in their homes, and is rapidly decreasing [down from a peak of upwards of $21,000,000 in 1936[6]] due to a number of causes beyond local control.

There is much unemployment, estimated at around 300,000 unemployed [Governor Leahy's statement before Wages and Hour Administrator, January 9, 1940; Hearings on Apparel Industry].

Under these circumstances the urgent need,—the almost desperate need,—of the introduction of new manufacturing industries amply explains,—and more than justifies, —the established policy of the Legislature in this regard.

FOURTH. It was with this background of long established legislative policy, and of urgent public need in the Island, to foster new local manufacturing industries, that the

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[3] Governor's Report, 1940, p. 10. *Confer*, Statement of the Governor of Puerto Rico, January 3, 1939, before the United States Committee for Reciprocity Information; copied, as to the part pertinent here, in the Social Security Hearings before the House Committee on Ways and Means, 76th Congress (Vol. II, pp. 1626, 1627).

[4] 72.3%; Opinions of insular Supreme Court [JUSTICE TRAVIESO], *in People of Puerto Rico* vs. *Rubert Hermanos, Inc.* ("500 Acre case"); Transcript of Record in this Court, Case No. 582 at October Term, 1939, p. 294; referring to Puerto Rico Reconstruction Census of 1935.

[5] Governor's Annual Report, 1936, pp. 154, 158-159.

[6] *Confer* Footnote 3, *ante*.

Legislature in 1938 amended the classification of matches for the purposes of the excise tax here in question, subdivision 7 of Section 16 of the local Internal Revenue Law, so as to foster the manufacture of that type of matches (soft wood, round matches) which it had been indicated by experience could perhaps be commercially produced in the Island as well as elsewhere ["Agreed Statement of Facts", *supra*, R. 17-18], as against the manufacture of the other type (the hardwood, square match) which, from commercial experience, apparently could only be profitably produced abroad [or, at least, as experience had shown, was being marketed only by the representatives of the Swedish manufacturers, manufactured in Sweden, and not in this country.

[Classification of matches for the purposes of the excise tax under that subdivision 7 of Section 16 of the law had been in effect in various forms since 1925 (Acts, Appendix, *infra*, pp. 41-47). The only substantial innovation in 1938 was to so change the classification as to favor the manufacture of that type (the soft wood, round match) which commercial experience was apparently showing could be profitably produced in Puerto Rico as well as in the United States mainland, as well as abroad, and an opportunity thereby opened up for building a new local manufacturing industry.] There is nothing in the record to indicate that the round match may not likewise be produced in Sweden or elsewhere in the world equally as well as the square match now being produced by the great Swedish company; although, apparently, it may require some change of machinery on their part, with which they have not yet sufficiently experimented. [The "Agreed Statement of Facts" says R. 18]:

> "that such manufacturers can not now determine whether they will ultimately be able to produce round-stick matches at a cost not greater than that of producing square-stick matches".

There is nothing to indicate that "such manufacturers" may not be able to do so, and thus to accommodate themselves to competitive conditions with local Puerto Rican manufacturers on an equal basis under this law.

STATEMENT

A statement of the case is in the Petition (*ante,* pp. 3-6).

SPECIFICATION OF ERRORS TO BE URGED

These are indicated under the heading "Questions Presented" and "Reasons for Granting the Writ" (*ante,* pp. 6-8 and pp. 10-13).

SUMMARY OF ARGUMENT

The trend of the argument is summarized under the headings "Questions Presented" and "Reasons for Granting the Writ" (*ante,* pp. 6-8 and pp. 10-13) in the Petition, and in the "Subject-Index" preceding the Petition (*ante,* pp. i-vii).

ARGUMENT

FIRST

There is here no violation of the "due process" "equal protection of the laws", or "uniformity in taxation" clauses of the Constitution or of Section 2 of the Organic Act for Puerto Rico.

POINT I

Upon this branch of the case a majority of the Judges of the Circuit Court of Appeals agree with our position. PRESIDING JUDGE MAGRUDER and JUDGE PETERS agree in rejecting the attacks made upon the legislation on these grounds. [JUDGE MAGRUDER, R. 59; JUDGE PETERS, R. 62; *ante, Petition,* pp. 2-3, 9, 11].

POINT II

The Legislature of Puerto Rico possesses substantially all of the local legislative powers of a State legislature, in all the respcts here involved, including the police powers.

This Court said in *People of Puerto Rico* vs. *Shell Co., supra,* 302 U. S. 253, 260-262:

> "1. Section 14 of The Foraker Act, passed April 12, 1900, c. 191, 31 Stat. 77, 80, provided that the statutory laws of the United States, not locally inapplicable, should have the same force and effect in Puerto Rico as in the United States, with certain exceptions not material here. Section 27 (p. 82) provided 'That all local legislative powers hereby granted shall be vested in a legislative assembly * * *.' And by Section 32 (p. 83-84), it was provided that that the legislative authority 'shall extend to all matters of a legislative character not locally inapplicable * * *'. These various provisions are continued in force by Sections 9, 25 and 37 of the Organic Act of March 2, 1917, c. 145, 39 Stat. 951. These provisions do not differ in substance from the various provisions relating to the powers of the organized and incorporated continental territories of the United States, in respect to which this court said in *Clinton* vs. *Englebrecht,* 13 Wall. 434, 441, that the theory upon which these territories have been organized 'has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress'; and in *Hornbuckle* vs. *Toombs,* 18 Wall. 648, 655-656, we said: 'The powers thus exercised by the Territorial legislatures are nearly as extensive as those exercised by any State legislature'. See also *Cope* vs. *Cope,* 137 R. S. 682, 684, where this court, speaking of this typical general provision contained in the Utah Organic Act, said that, with the exceptions noted in the provision itself, 'the power of the Territorial legislature was apparently as plenary as that of the legislature of a State.'' In *Maynard* vs. *Hill,* 125 U. S. 190, 204,

the essential similarity of the various provisions in respect of the powers of territorial legislatures was pointed out, and it was said that what were 'rightful subjects of legislation' was to be determined 'by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented.'

"The grant of legislative power in respect of local matters, contained in Section 32 of the Foraker Act and continued in force by Section 37 of the Organic Act of 1917, is as broad and comprehensive as language could make it. The primary question posed by the challenge to the validity of the act under consideration is whether the matter covered by the act is one 'of a legislative character not locally inapplicable.' * * *

"2. The aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the states and incorporated territories. *Groner* vs. *Standard Dredging Co.*, 224 U. S. 362, 370; *Porto Rico* vs. *Rosaly y Castillo, supra*" [227 U. S. 270], "p. 274. The effect was to confer upon the territory many of the attributes of *quasi*-sovereignty possessed by the states—as, for example, immunity from suit without their consent. *Porto Rico* vs. *Rosaly, supra.* By those acts, the typical American governmental structure, consisting of the three independent departments — legislative, executive and judicial—was erected. 'A body politic'—a commonwealth—was created. 31 Stat. 79, Sec. 7, c. 191. The power of taxation, the power to enact and enforce laws, and other characteristically governmental powers were vested. And so far as local matters are concerned, as we have already shown in respect of the continental territories, legislative powers were conferred nearly, if not quite, as extensive as those exercised by the state legislatures."

See also, to the same effect *People of Puerto Rico* vs. *Rubert Hermanos, supra,* 309 U. S. 543, 547, and the recent decision, at the present term, December 9, 1940, in

No. 21, *Bacardi Corporation* vs. *Domenech,* Treasurer, United States Law Week, Vol. 9, pp. 4056, 4059.

POINT III

In the exercise of the police power in local legislation the State legislatures exercise all of the unlimited powers of the English Parliament, except in so far as their powers may be expressly limited by the State constitution or by the Federal Constitution or by Congressional legislation pursuant to Constitutional power.

> "* * * the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people."
> *Munn* vs. *Illinois,* 94 U. S. (4 Otto) 113, 124 WAITE, CH. J.)

POINT IV

The police power, as habitually exercised by the State legislatures, extends to the exactment of laws to promote good order and the general welfare of society, as well as the safety, health and morals of the community.

It extends, particularly, to the enactment of tax laws with a view to the general welfare of the community, and to foster local industry.

[*Confer, infra,* Point VII-H, p. 26].

POINT V

In the case of Puerto Rico, the Congress has by the Organic Act (Secs. 25 and 37, *supra,* Act of March 2, 1917, 39 Stat. 951, 958, 964; Appendix, *infra,* p. 41) delegated all of its own local legislative powers with respect to that Island to the insular Legislature, except as otherwise prescribed or limited by that Act or other acts of the Congress.

A. It follows that *the Legislature* of Puerto Rico, *in legislating locally* for the government and the people of Puerto Rico *can do anything which the Congress itself could do,* except in so far as otherwise limited by the Or-

ganic Act or other acts of Congress. *Haavik vs. Alaska Packers Association,* 263 U. S. 510, 514; *Rafferty vs. Smith, Bell & Co.,* 257 U. S. 226, 232; *United States vs. Heinszen & Co.,* 206 U. S. 370, 385-386; *People vs. Shell Co., supra,* 302 U. S. 253, 259, *et seq.*

B. Hence **The Legislature of Puerto Rico** in legislating, as in the Acts here in question, in the exercise of its police powers, for the public welfare of Puerto Rico, the protection or development of its local industries, or for the welfare of its people, **is restrained only by the Fifth Amendment, and by the provisions of the Organic Act, or other pertinent acts [or treaties] of Congress, if any.**

POINT VI

The act here assailed does not violate the due process clause of the Fifth Amendment, nor the provisions of the first clause of Section 2 of the Organic Act guaranteeing due process, equal protection of the laws, and uniformity in taxation.

The plaintiff company's contention is, and the District Court held, with which JUDGE MAHONEY [alone] agreed in the Circuit Court of Appeals, that the Act here assailed violates the provision of the Fifth Amendment,

> "nor shall any person * * * be deprived of life, liberty, or property, without due process of law,"

and that of the first clause of Section 2 of the Organic Act for Puerto Rico (c. 145, 39 Stat. 951, substantially an embodiment of the "due process" clause of the Fifth Amendment):

> "Sec. 2. That no law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws."

The District Court and JUDGE MAHONEY are believed to have been plainly in error here.

POINT VII

In approaching this question several basic considerations are to be kept in mind.

A. As above pointed out (*ante,* Points II, III, IV, pp. ....), the Legislature of Puerto Rico in enacting these statutes was *exercising its legislative local police powers and local taxing powers* for the welfare of the community and for the protection and encouragement of its local industries. In the exercise of those powers it was clothed with all of the powers of a State legislature, and with all of the powers which the Congress could itself exercise in such local legislation,—substantially all of the broad powers of the English Parliament in this respect.

B. It was,—as appears not only from the Acts in question, but also from the series of Acts beginning in 1917, designed to encourage new local industries in Puerto Rico, the various Acts authorizing the Public Service Commission to exempt new industries from local taxation for a period of years, as well as the "*Exposition of Motives*" in the Act of May 15, 1937, relating to "Tourism" in Puerto Rico [*ante,* "Legislative Background and Policy", pp. 14-18], intending to exercise these legislative police powers and local taxing powers with a view to protect the welfare of the community and to protect and develop local industries, in accordance with its long-established settled legislative policy, by enacting legislation to protect and foster the local match manufacturing industry then being newly established in the Island [company organized in 1935 and production actually begun in February, 1939; "Agreed Statement of Facts", R. 17], and, manifestly, to discourage monopoly and to check the growth of financial absenteeism in the Island.

C. This encouragement of a local manufacturing industry, in accordance with the long-established policy of the Legislature, was certainly a legitimate legislative pur-

pose. *Cincinnati Soap Co.* vs. *United States, supra,* 301 U. S. 308, 320.

D. This legislative purpose to protect and foster local industry and particularly new industries in this densely populated Island where the need to encourage such industries is so manifest [*Confer, ante,* pp. 14-18], and to avoid the increase and growth of financial absenteeism, is quite in line with recent developments of legislative policy in a number of States of the Union.

For example, there are the statutes of **CALIFORNIA** discriminating against beer produced anywhere outside of that State [so-called "foreign beer", although perhaps produced in some other State of the Union]; **MINNESOTA,** discriminating against any liquors produced outside of that State [by forbidding bringing any such liquors into the State containing more than 25% of alcohol "ready for sale without further processing", *unless* bearing brands registered in the United States Patent Office], **PENNSYLVANIA,** discriminating against [a] beer produced outside of the borders of the State, as well as [b] sales by corporations having non-resident stockholders and officers [by means of license fees discriminating against distributors of beer produced outside of the States, and by forbidding sales of beer without a license, and forbidding a license to any corporation "unless all its officers and directors, and fifty-one percent of its stockholders have been residents of the State for the period of at least two years"].

And see also the statutes listed *infra,* in sub-paragraph "N" of this Point (pp. 28-29).

Cases involving the validity of the statutes of those three States, respectively, have recently come before the Supreme Court, and the statutes have been sustained. *State Board* vs. *Young's Market Co.,* 299 U. S. 59; *Mahoney vs. Triner Corp.,* 304 U. S. 401; *Premier-Pabst Co. vs. Grosscup,* 298 U. S. 226. **While those statutes relate to the**

manufacturing of liquors, yet the underlying principle is the same; viz., the fostering and protection of local home industry.

E. The mere fact of the existence of such a wide-spread sentiment and legislative policy among the States of the Union, along lines of thought quite analogous to the policy of the Legislature of Puerto Rico in enacting these statutes, to protect and encourage the growth of local manufacturing industries, as well as to protect them from foreign competition, is in itself evidence of the reasonableness of such a policy, and affords strong grounds for a presumption of the constitutionality of the statutes here assailed.

This Court, speaking by the CHIEF JUSTICE, in *West Coast Hotel Co. vs. Parrish,* 300 U. S. 379, 399, has said:

> "The adoption of similar requirements by many States evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it. **Legislative response to that conviction cannot be regarded as arbitrary or capricious,** and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment." (*Emphasis supplied.*)

F. Similarly, the adoption by the Legislature of Puerto Rico of the taxing statute here involved, for the purpose of encouraging a new local manufacturing industry, in accordance with the long-established policy of the Legislature to encourage such new industries, and the vital need for them in the Island, is indicative, in the words of the Chief Justice, in *West Coast Hotel Co.* vs. *Parrish,* above quoted, of *"a deep-seated conviction"* as to the need of such legislation,—a deep-seated persistent conviction throughout the Island.

G. The right to enter into a business, or to carry it on,—and particularly the right of a corporation of the Island, organized under its local laws, its own creature,—like the right to contract,—is not an absolute or unqualified

right; but is one of those forms of the "liberty" guaranteed by the due process clause, which, like other forms of liberty, is as was said in *West Coast Hotel Co.* vs. *Parrish, supra,* 300 U. S. 379, 391,

> "necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process".

H. In the exercise of its taxing powers, as well as in the exercise of its legislative police powers, the Legislature may act with a view to the welfare of the community; and thus, as here, to protect and foster local industry.

This Court has recently said, in *Cincinnati Soap Co.* vs. *United States, supra,* 301 U. S. 308, 320:

> "Congress, in passing the legislation here under consideration, is not forbidden to balance these respective probabilities. The tax itself, it is said, was imposed for the purpose of protecting certain industries in this country; and it is challenged on that ground. **That Congress has power to levy a tax with the collateral purpose of thereby protecting the industries of the United States is no longer open to doubt.** *Hampton & Co.* v. *United States,* 276 U. S. 394, 411."

As above pointed out, the delegation by the Congress to the Legislature of Puerto Rico of "all local legislative powers" empowers the Legislature to legislate as broadly in this respect for the benefit of the public welfare, in its local tax legislation, as the Congress could itself do.

I. In enacting such tax laws for the public welfare and to foster local industry, as with all other laws enacted in the exercise of the police power for the public welfare, *the Legislature is primarily the judge of the necessity of the enactment. West Coast Hotel Co.* vs. *Parrish, supra,* 300 U. S. 379, 398; *Nebbia* vs. *New York,* 291 U. S. 502, 537, 538.

Thus this Court said in the *West Coast Hotel Co.* case, *supra,* 300 U. S. 379, 397-398:

> "In *Nebbia* v. *New York*, 291 U. S. 502 * * * we again declared * * * ; that 'with the wisdom of the policy adopted, *with the adequacy or practicability of the law enacted to forward it*, the *courts are both incompetent and unauthorized to deal*'; that 'times without number we have said that *the legislature is primarily the judge of the necessity* of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.' " (*Italics supplied.*)

L. *The Legislature possesses wide powers of classification* in relation to the objects and persons to be affected by its legislation. The "equal protection" clause of Section 2 of the Organic Act for Puerto Rico [substantially like the similar clause in the Fourteenth Amendment, which does not extend to Puerto Rico] does not substantially change or enlarge the effect of the "due process" clause of the Fifth Amendment [which is likewise embodied in Section 2 of the Organic Act]. Taken together, these clauses simply require that State [or Territorial] laws apply alike to all persons similarly situated. They do not prevent, or further limit, classification by the Legislature. *Currin* vs. *Wallace*, 306 U. S. 1, 14; *Borden's Farm Products Co.* vs. *Ten Eyck*, 297 U. S. 251, 261-264; *Nebbia* vs. *New York, supra*, 291 U. S. 502; *Borden's Farm Products Co.* vs. *Baldwin*, 293 U. S. 194, 210; *Barrett* vs. *State of Indiana*, 229 U. S. 26.

M. There is a strong presumption in favor of the validity of the legislative action. He who assails the constitutionality of a statute must be prepared to show that it is *clearly* unconstitutional. The burden is upon him "to make a convincing showing". *Townsend vs. Yeomans*, 301 U. S. 441, 451.

As the Circuit Court of Appeals phrased it in *Sancho Bonet, Treasurer of Puerto Rico vs. Bacardi Corporation,* 109 F. (2) 57, 65[7]:

> "* * * *doubt is not enough,* that unconstitutionality must clearly appear in order to warrant us in holding legislation void." (*Italics supplied.*)

The rule has been re-stated innumerable times. *Confer,* e.g., *Green vs. Frazier,* 253 U. S. 253.

N. The broad and varied powers of the Legislature in the classification and regulation of industry, are illustrated in a wide range of cases. Examples are:

Florida—Miami Laundry Co. vs. Florida Dry Cleaning & Laundry Board, 134 Fla. 1, 8-13; 183 Sou. 759. Fixing minimum prices for laundry and dry cleaning.

Florida—Mayo, Commissioner vs. The Polk Co., 124 Fla. 534 (169 Sou. 41); appeal dismissed for want of a substantial federal question, 299 U. S. 507, 508. "Bond and License Law" of 1935 requiring licenses for citrus fruit dealers and canners.

Georgia—Townsend vs. Yeomans, 301 U. S. 441. Maximum charges handling and selling leaf tobacco.

Illinois—Munn vs. Illinois, 94 U. S. 113. Regulating prices to be charged by grain elevators.

New York—Nebbia vs. People of New York, supra, 291 U. S. 502. Regulating milk prices.

New York—Hegeman Farms Corp. vs. Baldwin, 293 U. S. 163. Milk prices.

New York—United States vs. *Rock Royal Co-op., Inc.* 307 U. S. 533, 562 *et seq.* Act and order of Secretary of Agriculture sustained, al-

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[7] Recently reversed; but on wholly different grounds, *Bacardi Corp. vs. Domenech, Treas., supra,* No. 21 at the present term, December 9, 1940; U. S. Law Week, Dec. 10, 1940, pp. 4056, 4059.

though specifically exempting co-operatives, and applicable to independent canners only.

North Dakota—Brass vs. State of North Dakota, 153 U. S. 391. Maximum charges for storage.

Pennsylvania—Milk Control Board of Pennsylvania vs. Eisenberg Farm Products, 306 U. S. 346. Milk prices.

Washington [State]. *West Coast Hotel Co. vs. Parrish, supra,* 300 U. S. 379. Minimum wages for women.

POINT VIII

It is in the light of the foregoing principles that the general rule is to be approached.

A. **The general rule is,** as it was stated in the *West Coast Hotel Co.* case, *supra,* 300 U. S. 379, 391, that:

> "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process".

B. In determining whether the remedy chosen by the Legislature in the exercise of its broad discretionary powers so far exceeds that which may be allowed to be "reasonable" in relation to its subject, or is so widely astray from any apparent public purpose that it cannot be said to be "adopted in the interests of the community", all of the foregoing principles must be borne in mind. As was said by Mr. Justice Roberts speaking for the Court in *Borden's Farm Products Co.* vs. *Ten Eyck, supra,* 297 U. S. 251, 263:

> "Judicial inquiry does not concern itself with the accuracy of the legislative finding but only with the question whether it so lacks any reasonable basis as to be arbitrary. *Standard Oil Co. v. Marysville,* 279 U. S. 582, 586-587".

And as this Court has likewise said:

"The court does not sit as a board of revision to substitute its judgment for that of the Legislature". (*St. Joseph Stock Yards Co. v. United States* 298 U. S. 38, 51).

POINT IX

Considered in the light of the foregoing established principles, the act of the Legislature of Puerto Rico here assailed does not violate the "due process" or the "equal protection" clause, nor the rule of uniformity in taxation. It is a valid enactment of the local legislative power.

WHEREIN DOES IT OFFEND?

A. The District Court says (Opinion, R. 29):

> "It is conceded that round-stick matches are die-cut from previously prepared blocks of soft, straight grained 'white pine' known as 'cork pine', whereas the square-stick matches are severed directly from sheets of wood veneer of a hardwood known as Aspen, and that the machinery used for the production of round-stick matches is different from that used for the production of square-stick matches, and that the cost to produce round-stick matches to a manufacturer engaged at present in the production of square-stick matches would be greater, although it cannot be determined if ultimately the cost of producing round-stick matches may be as great as that of producing square-stick matches, *but*, as above stated, *these differences, in the opinion of this Court do not warrant any distinct classification between round and square-stick matches for the purpose of taxation, as they have no apparent substantial, or fair relation to the object or purpose of an act to secure revenue*".

The Court expresses likewise a similar positive opinion that "there cannot be any reasonable basis" for the other classifications in the statute, with relation to matches, and the various ways in which they are packed (R. 29-30).

B. *That is all that he says upon the question. That is his decision.* He lists (R. 25-28) quite a number of decisions

which he considers in point; but he makes no analysis of the basic rules involved, to be gathered from the decisions.

C. *The District Court,* without analysis of the underlying rules to be deduced from the decisions *sets up his own individual opinion in opposition to that of the elected representatives of the people in the Legislature upon the questions of fact and of policy here involved.*

D. But the members of the Legislature, presumably familiar with local business and social conditions in the Island, have expressed a different opinion, by the enactment of this Act, in accordance with their established legislative policy, reaching back nearly a quarter of a century, to 1917, to encourage new industries in the Island [*ante,* pp. 14-18], and particularly new manufacturing industries.

Who shall say that the Legislature is not entitled to its opinion on this question; or that its opinion is so merely foolish and unreasonable that it may be disregarded by the courts;—that is to say, that it is so "unreasonable" that "no reasonable man" can be imagined as believing in it.

E. This Court has recently said (*Madden* vs. *Kentucky,* 309 U. S. 83, 87-88, 93, decided January 29, 1940 [FRANKFURTER, J.], sustaining a statute of the State of Kentucky imposing on its citizens an annual *ad valorem* tax on their deposits in banks outside of the State, at a higher rate than that imposed on their deposits in banks located within the State:

> "I. *Classification.*—The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized.[4] This Court fifty years ago concluded that 'the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation,'[5] and the passage of

time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.[6] Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.[7] The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.[8] * * *.

"In the states, there reposes the sovereignty to manage their own affairs except only as the requirements of the Constitution otherwise provide. Within these constitutional limits the power of the state over taxation is plenary. An interpretation of the privileges and immunities clause which restricts the power of the states to manage their own fiscal affairs is a matter of gravest concern to them.[23] It is only the emphatic requirements of the Constitution which properly may lead the federal courts to such a conclusion.

"[4] *New York Rapid Transit Corp.* v. *New York,* 303 U. S. 573, and cases there cited.

"[5] *Bell's Gap R. R.* v. *Pennsylvania,* 134 U. S. 232, 237.

"[6] *Citizens' Telephone Co.* v. *Fuller,* 229 U. S. 322, 329.

"[7] See the opinion of Mr. Justice Brandeis in *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, 42, 46-47.

"[8] *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61 78-79.

"[23] *Twining* v. *New Jersey,* supra, 92 [211 U. S. 78]".

SECOND

This plaintiff respondent, San Juan Trading Company, Inc., a domestic corporation of Puerto Rico, is not in position to invoke the provisions of the Reciprocal Commercial Trade Agreement with Sweden.

POINT X

On this branch of the case also the majority of the Judges of the Circuit Court of Appeals agree with our position, and agree in rejecting the plaintiff-respondent's attack on the legislation on this ground [JUDGE MAGRUDER, R. 59; JUDGE PETERS, R. 62; *ante, Petition,* pp. 2, 9, 12].

The trade agreement is a contract with Sweden for the benefit of that government and its nationals. It cannot be availed of by a domestic corporation of Puerto Rico, in any event, to increase its rights beyond those given it under the laws of the *quasi*-sovereign jurisdiction under which it is organized, and from which it derives all its powers and rights, or beyond the rights and privileges secured to it by those laws and by the Constitutional provisions and the provisions of the Organic Act of the Congress guaranteeing to it the benefits of "due process", "equal protection of the laws", and "uniformity in taxation". *Cf. The Head Money Cases,* 112 U. S. 580, 597-598.

THIRD

The phrase "similar articles" in the *proviso* added by the Butler Act to section 3 of the Organic Act for Puerto Rico prohibiting "discrimination" "between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico" [*Appendix, infra,* p. 41], does not further narrow the powers of the Legislature to classify subjects of taxation, beyond the restrictions imposed by the "due process", "equal protection of laws", and "uniformity in taxation" clauses of the Constitution and of section 2 of the Organic Act. It simply

places articles "imported" into the Island, whether from the mainland of the United States or from foreign countries, on a par with those "produced or manufactured" in the Island. It does nothing more. It does not give to such "imported" products, or to their importers, any greater rights or privileges than those accorded to the local products or to local citizens of the United States and the Island.

POINT XI

This is the only question in the case upon which a majority of the Judges of the Circuit Court are against our position. As above pointed out (*Petition, ante,* pp. 2, 9, 11-13), on this point PRESIDING JUDGE MAGRUDER, "with some misgivings" [R. 59], concurs in JUDGE MAHONEY's opinion that the Butler Act *proviso* actually does result in a further narrowing of the Legislature's powers of classification for taxation, beyond the requirements of "due process", "equal protection of the laws", and "uniformity in taxation"; and that, as JUDGE MAHONEY phrases it [R. 56; *ante,* Petition, p. 12],

> "A classification which would not be considered so unreasonable as to deny the equal protection of the laws can still be invalid as forbidden discrimination against foreign matches in favor of domestic ones".

JUDGE PETERS dissents. As above quoted (*Petition, ante,* pp. 2-3), he rejects this attack upon the legislation also, and thinks the legislation valid [R. 62].

POINT XII

No line of demarkation is pointed out as to how far this additional narrowing of the legislative power is to go, if this Butler Act *proviso* to Section 3 is to be considered as thus further narrowing the legislative powers of classification beyond the restrictions imposed by the "due process", "equal protection of the laws", and "uniformity in taxation" clauses.

A. The only suggested possible line of demarkation is indicated in the following paragraph in JUDGE MAHONEY'S opinion [R. 57]:

> "Where a statute in terms is non-discriminatory but its avowed intent and necessary effect is to favor local products over similar foreign products, it is the duty of the courts to declare the statute void. *Bethlehem Motors Co.* vs. *Flynt*, 256 U. S. 421 (1921); *Brimmer* v. *Rebman*, 138 U.S. 78 (1891); *Minnesota* v. *Barber*, 136 U.S. 313 (1890); *cf. Askren* v. *Continental Oil Co.*, 252 U. S. 444, 450 (1920); *Chalker* vs. *Birmingham & N. W. Ry., supra* [249 U. S. 522]. The cited cases indicate that if this were not done, provisions against discrimination could be easily circumvented with a consequent undesirable increase in trade barriers which the provisions were designed to prevent."

But this paragraph of JUDGE MAHONEY'S opinion really simply begs the question. He refers to "avowed intent and necessary effect" "to favor local products over *similar* foreign products". ***But the whole question really is whether or not they are "similar" within the meaning of the proviso.*** It is believed manifest that if the Legislature, in the proper exercise of its Constitutional powers, and subject to the restrictions imposed upon it by the "due process", "equal protection of the laws" and "uniformity in taxation" clauses, has actually classified the products in different classes, **then those products may not properly be said to be "similar" products** within the meaning of the *proviso. In other words, it all comes back to the same question in the end.* If they are really "similar" products,—that is to say, if there is really no substantial ground whatever for differentiation between them,—then there is likewise no ground for classification between them under the Constitutional requirements of due process, equal protection of the laws, and uniformity in taxation; and any legislative attempt to set up a factitous or wholly unsubstantial

differentiation for purposes of attempted classification falls under those prohibitions. If on the other hand, there actually is any such substantial difference, of any kind, that the legislative classification placing them in different groups for taxation purposes can be sustained under those Constitutional clauses, then by the same token they are not "similar" products within the meaning or the intent of the Congress in this Butler Act *proviso*. It is as long as it is broad .

B. The attempt to give such effect to the word "similar" in the Butler Act *proviso* as to create a further indefinite narrowing of the legislative powers of classification would simply lead into a field of uncertainty; and, it might almost be said, of mere guess work; and to the embarkation of the courts upon uncharted seas. In such cases it is submitted that the view of JUDGE PETERS in his dissenting opinion here [R. 62] is clearly sound, that

> "assuming that different minds might reasonably take different views on that point, I think the opinion of the Legislature should prevail."

C. No authorities are cited by JUDGE MAGRUDER on this branch of the case. The decisions of this Court cited by JUDGE MAHONEY (R. 57) do not appear to support him. To the contrary, as noted in our "Reasons For Granting the Writ" (Petition, *ante*, p. 11), they appear to be misapplied here. They are *Bethlehem Motors Co.* vs. *Flynt*, 256 U. S. 421, dealing with [pp. 422-424, 425-426] *discrimination between the parties* making or selling, in favor of local parties; *Minnesota* vs. *Barber*, 136 U. S. 313 [322-323] concerning meat not slaughtered within the State, but otherwise not differentiated in any way from locally slaughtered meat; and *Brimmer* vs. *Rebman*, 138 U. S. 78 [82-83], meat not slaughtered within one hundred miles; together with a reference to *Askren* vs. *Continental Oil Co.*, 252 U. S. 444, 450 and *Chalker* vs.

Birmingham, Northwestern & Ry. Co., 249 U. S. 522, equally wide of the mark here.

There is nothing in any of those decisions to support JUDGE MAHONEY'S *theory* that, as he puts it (R. 56) as above quoted:

> "A classification which would not be considered so unreasonable as to deny the equal protection of the laws can still be invalid as forbidden discrimination against foreign matches in favor of domestic ones".

Neither those decisions nor, as it is believed, any others can be found to support to that theory. To the contrary, this Court's decisions appear to uphold the rule that *such statutory provisions—and also corresponding treaty provisions*, such as that in the reciprocal trade agreement with Sweden before the Court in this case,—*are all alike intended, not to give preference to the foreigner, but simply to place the foreigner and the American citizen on a plane of exact parity.* In other words, that such provisions do not further narrow, in favor of the foreigner and beyond the rights of the local citizen, the restrictions of the requirements of due process, equal protection of the laws, and uniformity in taxation upon the Legislature's power of classification of the objects of taxation.

FOURTH

The phrases *"like products", "like articles"* in the Reciprocal Trade Agreement with Sweden,—even if that agreement could be here availed of by this respondent, a domestic corporation of Puerto Rico,—**do not further narrow the Legislature's power of classification of the objects of taxation, nor change the situation in any way.**

POINT XIII

The Trade Agreement with Sweden does not change the situation in any way.

A. The trade agreement simply places citizens and corporations of Sweden on a par with those of the United States. It gives them the same right to insist on the protection of the rules of due process, equal protection of the laws, and uniformity of taxation. It does nothing more. It does not give them greater rights or privileges than those accorded to our own citizens.

B. The provision of Article VI of the Trade Agreement upon which the respondent, the San Juan Trading Company, here relies, is simply (Appendix, infra, p. 55):

> "Articles the growth, produce or manufacture of the United States of America or Sweden, shall, after importation into the other country, be exempt from all internal taxes, fees, charges or exactions, other or higher than those payable on Like Articles of national origin or any other foreign origin."

C. The foregoing provision, aimed at the prevention of discrimination, is, in so far as it relates to commerce between the United States mainland and Puerto Rico, and to the sending to Puerto Rico from the mainland of articles which, as in the present case, have originally been imported into the mainland from the Kingdom of Sweden, to be construed as *in pari materia* with the *proviso* added by the Congress, by the Butler Act of March 4, 1927, 44 Stat. 1418, to Section 3 of the Organic Act for Puerto Rico (*ante*, pp. 33-37; *infra*, p. 41),

> "*Provided*, That no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico".

D. Manifestly, the phrase "Like Articles" used in the trade agreement means substantially the same thing as the phrase "similar articles" used in the *proviso* to Section 3 of the Organic Act, and is to be construed in the same manner. Neither phrase was intended to deprive the Legislature of the power of classification within the limitations of due process, equal protection of the laws, and the rule of uniformity in taxation.

CONCLUSION

The Act of the Legislature of Puerto Rico here assailed is valid. The judgment of the District Court striking it down was wrong, as was likewise the divided court affirmance resulting from the variant opinions of the Judges of the Circuit Court of Appeals. For the "Reasons For Granting the Writ" stated in the Petition it is believed that this case should be reviewed by this Court, and that the judgments of the lower courts should be reversed.

Respectfully submitted,

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